

TRANSCRIPT OF PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:

NOS COMMUNICATIONS, INC.
AFFINITY NETWORK, INC. and
NOSVA LIMITED PARTNERSHIP

EB Docket No. 03-96

ORIGINAL

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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HEARING

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JUN 4 2 04 PM '03

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IN THE MATTER OF:

NOS COMMUNICATIONS, INC.
AFFINITY NETWORK, INC., AND
NOSVA LIMITED PARTNERSHIP

EB Docket No. 03-96

File No. ED-02-TC-119

Order to Show Cause and
Notice of Opportunity for
Hearing

NAL/Acct. No.
20332170003

FRN: 0004942538

Wednesday,
May 21, 2003

The above-entitled matter came on for hearing
at the Federal Communications Commission, in Room
TWA-363, 445 - 12th Street, S.W., Washington,
D.C. 20554, commencing at 9:28 a.m.

BEFORE:

ARTHUR I. STEINBERG, Administrative Law Judge

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APPEARANCES:

On Behalf of the Federal Communications Commission:

GARY SCHONMAN, ESQ.
HILLARY DENIGRO, ESQ.
Enforcement Bureau
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On Behalf of NOS Communications, Inc.:

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On Behalf of Affinity Network, Inc., and NOSVA Limited Partnership:

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P-R-O-C-E-E-D-I-N-G-S

(9:28 a.m.)

ADMINISTRATIVE JUDGE STEINBERG: Let's go on the record. This is a prehearing conference in EB Docket Number 03-96, which was designated for hearing by an order to show cause and notice of opportunity for a hearing, FCC 03-75, released April 7th, 2003.

The issues seek to determine whether certain companies engaged in a misleading and continuous telemarketing campaign, and whether the operating authority of certain companies should be revoked, and whether the companies and/or their principals should be ordered to cease and desist from the provision of any interstate common carrier services without prior Commission consent.

In addition, the order to show cause authorized the imposition of a forfeiture up to the statutory maximum of \$1.2 million. By Order FCC03M-11, released April 16th, 2003, the Chief Administrative Judge has assigned this case to me, and scheduled an additional prehearing conference for this morning.

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1 Let me first take the appearances of the
2 parties, and this is going to be sort of unusual and
3 so bear with me on this. I have everything under
4 cover. Let me take first the appearance for a
5 principal or other legal representatives from NOS
6 Communications, Inc.

7 MR. LUKAS: Your Honor, Russell Lukas and
8 George Lyon for NOS Communications, Inc.

9 ADMINISTRATIVE JUDGE STEINBERG: Okay.
10 Now, I am confused, because Mr. Adams, and Mr. Permut,
11 and Mr. Price, and Ms. Odin, filed a notice of
12 appearance for NOS, as well as the other two. Am I
13 correct?

14 MR. PERMUT: No, I think, Your Honor, that
15 we -- that what was filed was for the principals of
16 NOS Communications, Inc., and NOSVA Limited
17 Partnership, and Affinity Networking.

18 ADMINISTRATIVE JUDGE STEINBERG: Well,
19 yes, that is what I was talking about. We are going
20 to take the appearances for the principals first.

21 MR. PERMUT: Oh, okay.

22 ADMINISTRATIVE JUDGE STEINBERG: Because

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1 I am tracking the language in the hearing designation
2 order.

3 MR. PERMUT: Then I think we have to go
4 back, right?

5 ADMINISTRATIVE JUDGE STEINBERG: Yes, let
6 me start again. We will get to you, but later, and to
7 my incredibly organized mind, it makes me do things
8 this way. Okay. Let me start again. Appearance for
9 a principal or other legal representative from NOS
10 Communications, Inc.

11 MR. PERMUT: Yes, Phil Permut, Danny E.
12 Adams, and W. Joe Price, for the principals of NOS
13 Communications, Inc., NOSVA Limited Partnership, and
14 Affinity Networking.

15 ADMINISTRATIVE JUDGE STEINBERG: Okay.
16 Now, that will take care of Infinity, and NOSVA. You
17 don't say NOSVA, but you say N-O-S-V-A, or whatever?

18 MR. PERMUT: Whatever.

19 ADMINISTRATIVE JUDGE STEINBERG: And then
20 for the Chief of the Enforcement Bureau, Federal
21 Communications Commission?

22 MR. SCHONMAN: Gary Schonman.

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1 MS. DENIGRO: Hillary DeNigro.

2 MR. SCHONMAN: And I would also like to
3 enter an appearance on behalf of Donna Cyrus, who is
4 also serving on behalf of the Chief of the Enforcement
5 Bureau.

6 ADMINISTRATIVE JUDGE STEINBERG: Thank
7 you. Now, we will get to the other stuff. This
8 notice of appearance, or in the alternative, the
9 petition to intervene, filed on May 7th, 2003, by NOS
10 Communications, Inc., and also a notice of appearance,
11 or in the alternative, a petition to intervene filed
12 on May 7th, 2003, by Affinity Working and NOSVA
13 Limited Partnership, the petitioners point out or
14 contend, depending upon which position you take, that
15 they were not named as parties to this proceeding in
16 the order to show cause designating this case for
17 hearing.

18 They contend that they have an interest in
19 this proceeding, because they could be subjected to
20 severe sanctions, including loss of their operating
21 authority, and the imposition of a large forfeiture.

22 The petitioners request the acceptance of

1 their notices of appearance, or in the alternative, a
2 ruling permitting them to intervene in this
3 proceeding. Yesterday, the Bureau filed a motion to
4 strike, and opposition in a petition for
5 reconsideration, and they filed that with the
6 Commission.

7 In that pleading, the Bureau conceded that
8 -- I guess conceded -- that NOS Communications, Inc.,
9 and Infinity Network, Inc., and NOSVA Limited
10 Partnership, were parties in interest and are parties
11 to this proceeding. Is that correct?

12 MR. SCHONMAN: That's correct.

13 ADMINISTRATIVE JUDGE STEINBERG: Okay. So
14 you would have no objection to me granting the
15 petitions for leave to intervene and accepting
16 appearances on behalf of those parties?

17 MR. SCHONMAN: Well, we don't think that
18 the motion to intervene is even necessary, because it
19 is our position that the show cause order made the
20 companies parties to the proceeding.

21 So to that extent, we have no objection
22 with accepting their notice of appearance. We welcome

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1 their participation in this proceeding.

2 ADMINISTRATIVE JUDGE STEINBERG: Okay. I
3 kind of read the hearing designation order, and
4 particularly the notice of appearance section,
5 differently than you did.

6 So out of an abundance of caution, I am
7 going to grant the petitions for leave to intervene,
8 and accept the notices of appearance, and I think that
9 the petitioners are clearly parties in interest, and
10 I would cite Hertz Broadcasting of Birmingham,
11 Incorporated, 46 FCC 2nd 350. It was a 1974 Review
12 Board case.

13 Now let me take the appearances on behalf
14 of NOS Communications, Inc.

15 MR. LUKAS: Russell Lukas and George Lyon.

16 ADMINISTRATIVE JUDGE STEINBERG: And on
17 behalf of Affinity and NOSVA?

18 MR. PERMUT: Philip V. Permut, Danny
19 Adams, and W. Joe Price.

20 ADMINISTRATIVE JUDGE STEINBERG: Okay.
21 You see, we could have done that in two seconds had I
22 not been so -- well, okay. There was a petition for

1 reconsideration filed by NOS Infinity and NOSVA on May
2 7th, 2003. And this matter is currently pending
3 before the Commission.

4 And as I mentioned yesterday the Bureau
5 filed a motion to strike that petition and in
6 opposition to the petition, and the Commission is
7 going to have to deal with that, and not me.

8 I will just briefly state that the
9 petition raises fundamental basic questions regarding
10 the Commission's authority to impose sanctions as
11 outlined in the order to show cause, as well as
12 challenging issues of jurisdictional of subject matter
13 on the alleged matter in the alleged violations.

14 And the Bureau disagrees with that. So we
15 will let the Commission decide on that. Okay. Now,
16 the next thing that I want to turn to is the
17 possibility of settling this case, and the Rules,
18 1.248(c)(7) and 1.94(a), suggest that I should ask the
19 question as to whether the parties are willing to
20 enter into negotiations leading to a consent
21 agreement.

22 Before I get the answer to that, to my

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1 simple mind this seems to be a fairly easy case to
2 settle, and to enter into a consent order, and maybe
3 the payment of a fine to the Treasury.

4 I can't imagine that NOS, Affinity, and
5 NOSVA, could condone the activities that were
6 allegedly engaged in, and this is assuming that they
7 can be proven, and assuming that not a rogue employee
8 or several rogue employees -- and maybe I am
9 anticipating a defense here.

10 I don't think that it could be argued that
11 using trickery, deceit, and threats to get its
12 customers back is a legitimate practice that the
13 Commission should smile upon. Again, assuming that
14 the Bureau proves its case.

15 It seems to me that it might be beneficial
16 to everybody to just enter into a consent order which
17 doesn't admit any liability, but says maybe we
18 shouldn't do this again, even assuming that we did it
19 in the past, and we are not admitting that we did it
20 in the past.

21 It is also in the interest of the
22 Commission to end this proceeding through a consent

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1 order, because of the questionable practices that were
2 allegedly engaged in could be ended immediately. The
3 Commission could also use the money given -- well, I
4 won't get into politics.

5 But the Commission could also the money,
6 and I assume that money will be part of the deal. In
7 addition, even if I impose all of the sanctions that
8 I am authorized to impose, there is no assurance that
9 a future Commission will affirm.

10 As we all know, several years from now a
11 different Commission will be sitting and when this
12 case comes up for review there is no assurance that
13 this Commission will see eye-to-eye with the
14 Commission that set this case for a hearing.

15 It has happened in the past where one
16 Commission says, well, what was that Commission all
17 concerned about. We don't care about this, and they
18 go off on their merry way, and they don't see what the
19 big deal was four years ago.

20 Plus, everybody gets to save a lot of
21 money in litigation costs, which too bad your clients
22 aren't here today, and I should make you tell them

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1 that. And of course the Commission's involvement.

2 Anyway, is anybody not willing to enter
3 into negotiations and at least talk about a consent
4 agreement?

5 MR. PERMUT: No, we are willing.

6 JUDGE STEINBERG: I know that I have to
7 drag you kicking and screaming, but if they talk, you
8 will talk?

9 MR. SCHONMAN: Yes, Your Honor. Let me
10 say several things about this. Certainly the Bureau
11 would be willing to entertain discussions about the
12 possibility of settlement. However, at this time I
13 would not want to suggest any terms, and for example,
14 whether or not the companies or principals would admit
15 to any violations, and I would not want to at this
16 point suggest what the terms of any consent decree
17 might be.

18 But suffice it to say that we would
19 entertain the idea of engaging in negotiations. But
20 as a threshold matter, we would want to know who we
21 are talking to. And in that respect, we know who the
22 companies are, but counsel has not identified who the

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1 exact principals are and who they are representing in
2 this case.

3 And certainly that would be a vital aspect
4 in entertaining any negotiations for settlement. We
5 don't know who we are settling with.

6 JUDGE STEINBERG: Well, that's why they
7 call it negotiations, I guess. And of course we are
8 going to have discovery and you can ask those
9 questions on discovery.

10 MR. SCHONMAN: I wonder if Your Honor
11 would entertain the idea now of inquiring of counsel
12 who their clients are, and who they represent.

13 JUDGE STEINBERG: Well, you can do that in
14 discovery, and just ask who they represent and that's
15 fine. I mean, the notice of appearance section of the
16 HDO didn't say identify the principals, and then tell
17 us that you represent them.

18 It just said, quote, a principal or other
19 legal representative from the companies that enter
20 appearances. Isn't there some kind of an ownership --
21 did you guys have file to file ownership reports? No?
22 Okay. So I guess you can't look there. But just ask

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1 in discovery, that's all.

2 MR. SCHONMAN: We will do that.

3 JUDGE STEINBERG: And I will tell you
4 something. If they ask and you object, I am going to
5 say you have to tell them.

6 MR. PERMUT: I don't think we are going to
7 object.

8 JUDGE STEINBERG: Okay.

9 MR. PERMUT: I think we are looking for
10 some guidance from the Commission as to what the
11 Commission thinks the principals are.

12 JUDGE STEINBERG: Well, I certainly don't
13 know.

14 MR. PERMUT: I don't either, and that's
15 why we --

16 JUDGE STEINBERG: I mean, there must be
17 corporate officers or some limited partners.

18 MR. SCHONMAN: Owners and shareholders as
19 well.

20 MR. PERMUT: What?

21 MR. SCHONMAN: Owners and shareholders.

22 MR. PERMUT: The position that we have

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1 taken in the petition for reconsideration is that
2 there is nothing under Title 2 which explains what a
3 principal is, and so any guidance that the Commission
4 can give us, and hopefully they will on the petition
5 for reconsideration, we will have that issue solved.

6 JUDGE STEINBERG: But I would just say
7 don't close the door on -- and don't get too stubborn,
8 because you might get a better deal from them than you
9 would get from me, and that is what happened in
10 Westel, and the case settled, and they got a hell of
11 a better deal.

12 The Commission got a hell of a better deal
13 than they would have gotten from me. And also if you
14 want me to act as a settlement Judge, I would be more
15 than willing.

16 As a settlement Judge, I would be more
17 than willing to do that, and if you wanted to discuss
18 with me things on a private basis, I would be willing
19 to do it. And I can assure you that none of it will
20 get out and if the case goes to hearing, nothing that
21 I am told privately will find its way into a decision.

22 But I am not going to do it unless

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1 everybody consents to me doing it. I have done it in
2 other cases with everybody's consent, and it has
3 worked out very well. But if there is any objection,
4 then I can't do it.

5 I am good at keeping things pretty close
6 to the vest, and I am also good that if the case goes
7 to hearing that the decision is based on the record,
8 and not on anything that I have heard in settlement
9 discussions.

10 Okay. Let's turn to discovery. Let me
11 ask the companies what type of discovery that they are
12 contemplating. Mr. Permut.

13 MR. PERMUT: Well, we filed an FOIA
14 request, or we at least tried to, and apparently you
15 don't have, and we will give you a copy of it. And
16 that is what we see at least as the pacing item,
17 because we would assume that the Bureau would have no
18 problem meeting it since they put forth in the
19 designation order a lot of the documents that we are
20 asking for.

21 And it would not be, I assume, the typical
22 FOIA where you have to search through the files to

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1 find it and so forth. Once we get that, we will have
2 a better feel for what we want to do in discovery.

3 But obviously the discovery that is
4 contemplated at this point would be based on the FOIA
5 documents, plus other thoughts that we had, which
6 would include depositions.

7 One of the issues which clearly comes up
8 here is a lot of these depositions that we would want
9 to take, or at least consider taking, would be third-
10 party depositions, which the Bureau does not control
11 the witnesses, and we don't control the witnesses.

12 And we are going to have to in some cases
13 find them, and if the Bureau can help us in locating
14 some of these people that would be great.

15 JUDGE STEINBERG: Well, I guess what you
16 can do is that after you get the documents, ask for it
17 in interrogatories --

18 MR. PERMUT: Yes, right, and then we would
19 also do that as well, if appropriate, and then we
20 would also look for depositions. And I don't see a
21 motion to produce documents and that will be coming
22 through.

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1 So I would think that we would then do a
2 large number of depositions of third-parties, and we
3 will be back to you to get subpoenas once we find
4 them.

5 JUDGE STEINBERG: Mr. Lukas.

6 MR. LUKAS: We concur.

7 JUDGE STEINBERG: Mr. Schonman.

8 MR. SCHONMAN: Well, the Bureau
9 contemplates document requests, and depositions, and
10 interrogatories as you have suggested.

11 JUDGE STEINBERG: All right. I would
12 suggest on the interrogatories -- well, no, I would
13 prefer that the interrogatories be used to the extent
14 that you can limit them to the identity of individuals
15 with personal knowledge of the facts, and then you go
16 out and depose them.

17 Now, obviously you are going to ask who
18 the principals are, et cetera, et cetera, and that's
19 okay. I look at that, and I prefer that you not ask
20 real substantive questions in interrogatories, and
21 that you save them for the depositions of the
22 individuals.

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1 Of course, we know who answers the
2 interrogatory questions, and I don't want to get in
3 the middle of interrogatories, and objections, and a
4 motion to compel, and this and that, and I don't think
5 that does anybody any good when you can just ask the
6 people involved.

7 So I would ask you both parties to limit
8 the interrogatories to the extent that you can and to
9 just identifying individuals with personal knowledge
10 of the facts.

11 And if there are background questions that
12 you can do in interrogatories, that's fine. If it
13 becomes unworkable, then let me know, and maybe I can
14 persuaded to modify the rule.

15 Now, the Bureau usually files their
16 requests for admissions of facts and do you plan on
17 doing that?

18 MR. SCHONMAN: Yes, we do, Your Honor.

19 JUDGE STEINBERG: Okay. So you should get
20 or you could get most of the documents you want as an
21 attachment to their request for admissions, or at
22 least that is what the Bureau has done in the past.

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1 MR. PERMUT: It could be.

2 JUDGE STEINBERG: All right. Am I
3 correct?

4 MR. SCHONMAN: A fair number of times.

5 JUDGE STEINBERG: Okay. And if anything
6 can short-circuit that, it would be by just turning
7 over the documents, and that would be great, too, and
8 it would save somebody else a lot of work. Okay.

9 MR. PERMUT: I had one question on
10 discovery if I might. Will statements that constitute
11 Jenks statements be turned over in response to the
12 FOIA as well?

13 JUDGE STEINBERG: I didn't hear you.

14 MR. PERMUT: I'm sorry, the statements
15 that would be considered Jenks statements, will they
16 be turned over at an earlier date?

17 MS. DENIGRO: Yes. You know, I have not
18 seen your request if you asked for that.

19 MR. PERMUT: Well, I think it covers Jenks
20 statements. I didn't know if -- well, fine.

21 MS. DENIGRO: Yes, we will undoubtedly
22 turn over those, if that is included in your request.

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1 MR. PERMUT: Okay. That you very much.

2 JUDGE STEINBERG: That's good, because
3 after the witness testifies, and then you hand over to
4 the companies the statements, I would give them ample
5 time to review the statements to formulate their
6 questions, and I would go even so far to say that you
7 could take their depositions based upon the statements
8 if they didn't know that, and so that would be good.

9 Now, let me also say that with respect to
10 discovery that i want everybody to make a good faith
11 attempt to work out your differences among yourselves.
12 A serious and genuine effort should be made to reach
13 a compromise if you reach an impasse.

14 Now, I won't want you to come to me for a
15 ruling on a discovery matter without first attempting
16 to agree among yourselves.

17 In this connection any request for a
18 ruling on a discovery matter must include a
19 certification that counsel for the parties involved
20 made a good faith attempt to resolve the dispute but
21 could not do it. Any other discovery matters that we
22 have to talk about? Before we get to dates, any other

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1 matters?

2 (No response.)

3 JUDGE STEINBERG: Let me just say
4 something. Do you think that it would be possible to
5 put the direct cases in writing? I am directing this
6 to Mr. Schonman

7 MR. SCHONMAN: I think that a fair number
8 of the direct case exhibits could be reduced to
9 writing for the Bureau's witnesses, and for those
10 witnesses who are favorable.

11 JUDGE STEINBERG: Okay.

12 MR. SCHONMAN: And for other witnesses,
13 that is not likely.

14 JUDGE STEINBERG: And do you plan to put
15 on any kind of direct case, or is yours all going to
16 be rebuttal?

17 MR. PERMUT: It will be all rebuttal.

18 JUDGE STEINBERG: Okay. And I would
19 encourage you or I would encourage both parties or all
20 parties to put as much direct and rebuttal cases in
21 writing as possible, because that saves a whole lot of
22 time. I can't require you to do it, but I encourage

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1 it.

2 Let's go off the record and talk about
3 procedural dates.

4 (Discussion off the record on procedural
5 dates.)

6 JUDGE STEINBERG: We are back on the
7 record. While we were off the record, we agreed to
8 the following procedural dates. September 26th, 2002,
9 will be the date for completion of all discovery, and
10 completion means that everything is finished by that
11 date.

12 And so anything that is filed has to be
13 timed so that the response would be due on September
14 26th. I don't want anything filed on the 26th or the
15 25th, et cetera. I want everything wrapped up by that
16 date.

17 If you start a deposition on September
18 26th, I would like you to finish it on September 26th.
19 Now, in saying that I do recognize that games could be
20 played with procedural things, and timing, and things
21 like that, and if I perceive that games are being
22 played to prevent another party from responding fully

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1 or this, or that, or the other thing, then I will deal
2 with that appropriately and extend the deadline if I
3 feel that somebody is playing games.

4 October 14th, 2003 will be the date for
5 the exchange of direct case exhibits. Stipulations,
6 if you reach any stipulations, should be exchanged on
7 that date, and a list of witnesses, if any, could be
8 called for oral testimony.

9 And if a witness is going to be called for
10 oral testimony, the party calling that witness should
11 provide a brief description or outline of the
12 testimony that the individual is going to give so that
13 the other side can prepare.

14 October 21st, 2003 will be the date for
15 the notification of witnesses desired for cross-
16 examination. The notification can be made by
17 telephone or fax, and if you do it orally, it should
18 be confirmed in writing.

19 November 12th, 2003, will be the date for
20 commencement of the hearing and we will start at 9:00
21 a.m. in the Commission's Washington, D.C. offices. We
22 did briefly discuss rebuttal, and we will throw out

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1 dates for rebuttal at the end of the hearing.

2 MR. SCHONMAN: Your Honor, if I might
3 interrupt at this point. It is my understanding that
4 you have a preference that it starts immediately after
5 the --

6 JUDGE STEINBERG: Yes, my preference is
7 that it start immediately after the conclusion of the
8 direct cases, or at least there not be any big break
9 between direct cases and rebuttal, but we will talk
10 about that later because I want to be fair to all the
11 parties.

12 Let me just say something about exhibits.
13 Please, please, please, put a page number on every
14 page of the exhibit, except the cover sheet. If you
15 use a cover sheet, you don't have to number the cover
16 sheet.

17 If you have an exhibit, I want the number
18 one on the first page, and then numbered consecutively
19 to the last page. If even the exhibit consists of a
20 letter and it has got several attachment, and each
21 attachment has got a page one, just put a number on
22 every page, or from one until the end, because it

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1 makes it a lot easier to refer to that when you are
2 talking witnesses and you are writing findings.

3 And you can start each exhibit with a
4 number one, or page number one. There will be a
5 footnote in my order confirming the dates, and
6 explaining how I like the exhibits.

7 There also should be an index or chart in
8 front of the exhibits showing the exhibit number, and
9 then the title of the exhibit, and then the name of
10 the sponsoring witness, or an identification of the
11 sponsoring witness, and that makes it easier for
12 everybody to know what is going on, especially me.

13 And if you have any questions about the
14 exhibits and the markings, just call me. Anything
15 further that we have to talk about today? Mr.
16 Schonman?

17 MR. SCHONMAN: No, I think we have covered
18 it all, Your Honor.

19 JUDGE STEINBERG: Mr. Lukas?

20 MR. LUKAS: No, we are fine. Thank you.

21 JUDGE STEINBERG: Mr. Permut?

22 MR. PERMUT: We are fine. Thank you.

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1 JUDGE STEINBERG: All right. And then
2 that will be it. If you need another conference,
3 please let me know. But I would like you to start
4 talking about settlement, because I really think that
5 this should not be difficult from either perspective.

6 But as I said, I can't imagine that just
7 the company, or its components, or activity -- and
8 even if it was done by a rogue employee, you can say
9 that we didn't intend to do it, and we will never
10 permit it to happen again, and we will take action
11 against these rogue employees, and clean up our act,
12 and clean up their act, and the Government can use the
13 money.

14 Okay. With that, we will go off the
15 record now, and I will probably see you before
16 November, but if I don't, have a good summer, and a
17 Labor Day, or whatever.

18 MR. PERMUT: Thank you, Your Honor.

19 MR. SCHONMAN: Thank you, Your Honor.

20 MR. LUKAS: Thank you, Your Honor.

21 JUDGE STEINBERG: Let's go off the record.

22 (Whereupon, at 10:20 a.m., the hearing was concluded.)

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CERTIFICATE

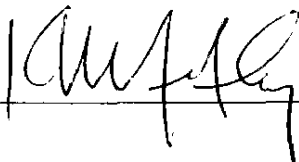
This is to certify that the foregoing transcript in the
matter of: EB Docket No. 03-96

Before: Federal Communications Commission

Date: May 21, 2003

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.



A handwritten signature in dark ink, appearing to be 'K. M. F. L.', is written over a horizontal line.